

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

----- X
BRIAN MARTINEZ,

Petitioner,

- against -

SUSAN O'CONNELL, Superintendent,

Respondent.
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NOTICE OF MOTION
PURSUANT TO FED. R. CIV. P.
12(E) FOR A MORE DEFINITE
STATEMENT OF CLAIMS

06-CV-0887 (DNH)(RFT)

PLEASE TAKE NOTICE, that upon the annexed Declaration of Lisa Fleischmann and upon all the pleadings and proceedings heretofore had herein, the undersigned, on behalf of Respondent SUSAN O'CONNELL, will move this Court at the Courthouse, located at 445 Broadway, Room 314, Albany, New York, 12207, on November 20, 2006, at 10:00 a.m. or as soon thereafter as counsel may be heard, for an order pursuant to Fed. R. Civ. P. 12(e), requiring petitioner to submit a more definite statement of the claims raised in his petition for a writ of habeas corpus, or, alternatively, a 60-day extension of time within which to file a response to the petition, and for such other and further relief as this Court may deem just and proper.

Dated: New York, New York
October 16, 2006

ELIOT SPITZER

Attorney General of the State of New York

Attorney for Respondent

120 Broadway

New York, New York 10271

By: S/Lisa Fleischmann

LISA FLEISCHMANN, Bar Roll #513613

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DECLARATION IN SUPPORT OF
MOTION PURSUANT TO FED.
R. CIV. P. 12(E) FOR A MORE
DEFINITE STATEMENT
OF CLAIMS

06-CV-0887 (DNH)(RFT)

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

LISA FLEISCHMANN, pursuant to 28 U.S.C. § 1746, declares under penalty of perjury
as follows:

1. I am an Assistant Attorney General in the office of ELIOT SPITZER, Attorney
General of the State of New York, attorney for respondent. I submit this declaration in support
of respondent's motion for an order requiring petitioner, pursuant to Federal Rule of Civil
Procedure 12(e), to submit a more definite statement of his habeas claims, and the factual and/or
legal basis for each claim. Alternatively, in the event this motion is denied, respondent requests
a 60-day extension of time within which to respond to the petition from the date this motion is
denied.

2. On January 21, 1999, petitioner was convicted, after a jury trial, of Kidnapping in
the Second Degree (New York Penal Law (hereafter, "Penal Law") § 135.20), Assault in the
Second Degree (Penal Law § 120.05(6)), Reckless Endangerment in the First Degree (Penal Law
§ 120.25) and Criminal Possession of a Weapon in the Fourth Degree (Penal Law § 265.01(2)).
He received an aggregate, indeterminate sentence of from 12 ½ to 25 years imprisonment.

3. The Appellate Division, Fourth Department, unanimously affirmed petitioner's conviction on October 1, 2002. People v. Martinez, 298 A.D.2d 897, 749 N.Y.S.2d 118 (4th Dept. 2002). Petitioner's application for leave to appeal to the New York State Court of Appeals was denied on October 31, 2002. People v. Martinez, 98 N.Y.2d 769, 752 N.Y.S.2d 10 (2002).

4. According to the records of the New York State Department of Corrections, petitioner is presently incarcerated at Oneida Correctional Facility.

5. By petition dated July 13, 2006, petitioner seeks a writ of habeas corpus. Your Honor issued an order, dated October 4, 2006, ordering respondent to file a response on or about December 15, 2006. My office received that order on or about October 11th. I was assigned on October 13th to respond to the petition and I have ordered the trial transcript and relevant state court records from the Cayuga County District Attorney's Office.

6. Respondent seeks an order pursuant to Fed. R. Civ. P. 12(e) because it will be difficult to respond to the petition in its current state. In his petition form, petitioner does not list the grounds as to which he seeks habeas corpus relief. Rather, he has attached an affidavit to his petition which outlines his post-conviction history and the grounds raised in all post-conviction applications. It is unclear whether he is seeking to raise these grounds affirmatively in his habeas petition or simply setting forth procedural history. Moreover, petitioner claims he is actually innocent of his crimes, but it is unclear from his affidavit as to whether he seeks to plead an "actual innocence" claim in his petition. From his affidavit allegations, it seems that he has not exhausted a newly discovered evidence claim nor met the requisites of 28 U.S.C. § 2254(e)(2), and so any such claim would not be ripe for habeas adjudication. In short, and for reasons more fully discussed in the accompanying memorandum of law, because it is difficult to discern exactly what claims petitioner purports to raise, respondent respectfully requests that this

Court order petitioner to provide a more definite statement of his claims.

7. Additionally, in the event that this Court declines to order petitioner to state his claims with more clarity, respondent asks this Court to grant a 60-day extension of time, from the date this motion is denied, within which to respond to the petition. As the Court can see, petitioner has raised a number of claims, many of which contain subclaims. Further, it appears that the post-conviction record will be lengthy and will require careful review. The undersigned anticipates that a number of the claims will be subject to procedural arguments, such as exhaustion and bar, given that some of the appellate claims were unpreserved for review, and certain post-conviction application were not always properly brought (such as the state habeas petition). For these reasons, an extension of time would be greatly appreciated.

8. This motion is made on submission, and oral argument is not requested.

WHEREFORE, respondent respectfully requests that this Court order petitioner, pursuant to Fed. R. Civ. P. 12(e), to submit a more definite statement of his claims, or, alternatively, grant respondent a 60-day extension of time within which to respond to the petition from the date this motion is denied, and grant such other and further relief as this Court may deem just and proper.

Dated: New York, New York
October 16, 2006

s/Lisa Fleischmann
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To: Clerk of the United States District Court
Northern District of New York
James T. Foley US Courthouse
445 Broadway, Room 314
Albany, New York 12207

Mr. Brian Martinez, 99-B-0537
Oneida Correctional Facility
6100 School Road
Rome, New York 13440